IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSAs No.56 & 120 of 1995

Decided on : November 15, 2006

RSA No.56 of 1995

Tulsa Singh **…..Appellant.**

VERSUS

Ram Asri and others **…..Respondents.**

RSA No.120 of 1995

Parkasho Devi and others **.....Appellants.**

VERSUS

Ram Asri and others **.....Respondents.**

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The Hon'ble Mr. Justice Surjit Singh, Judge.

Whether approved for reporting?[1]

For the Appellant(s) : **Mr. N.K. Thakur, Advocate, in RSA No.56/1995 and Mr. H.K. Bhardwaj, Advocate, in RSA No.120/1995.**

For the Respondents : **Mr. Ajay Sharma, Advocate, for respondents No.1(a) to 2(d) and Mr. H.K. Bhardwaj, Advocate, for respondents No.3 to 6 in RSA No.56/1995.**

Mr. Ajay Sharma, Advocate, for respondent No.2, Mr. N.K. Thakur, Advocate, for respondent No.3 and Ms Shweta Julka, for respondent No.4 in RSA No.120/1995.

Surjit Singh, Judge (Oral)

Heard and gone through the record.

2. This judgment is to dispose of two appeals, the particulars whereof are given in the title, because both of them arise out of a common judgment of the first Appellate Court.

3. Facts relevant for disposal of the two appeals may be noticed. Late Shri Ram Asra and two other persons, namely Yog

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Whether the reporters of the local papers may be allowed to see the Judgment?

Raj and Mohan Lal, were owners of 7 Kanal 6 Marlas land, bearing Khasra Nos.14/7/1 and 14/6/2. Ram Asra was owner to the extent of half share. In the year 1971, he created mortgage in respect of his share in favour of one Milkhi Ram. He is now represented by his widow Ram Asri as respondent No.1 (in RSA No.120 of 1995). In the year 1984, Ram Asra filed a suit for redemption of the mortgage and possession of the suit property. He died during the pendency of the suit and his legal representatives, i.e. appellants (in RSA No.120 of 1995) came on record and they continued with the suit. Besides Ram Asri, widow of Milkhi Ram, the mortgagee, respondent Haria and appellant Tulsa Singh (in RSA No.56 of 1995) were impleaded as defendants. It was alleged that Milkhi Ram, after the creation of mortgage, had created tenancy in favour of Haria and Tulsa. Tulsa was alleged to have been inducted as tenant over land bearing Khasra No.14/7/1 and Haria over land bearing Khasra No.14/6/2.

4. Ram Asri, representing the estate of mortgagee, and Tulsa Singh filed common written statement, in which they stated that the land had been in occupation of the tenants prior to the creation of the mortgage and that Khasra No.14/7/1, measuring 2 Kanals 12 Marlas, was in possession of Tulsa Singh, and the land measuring 4 Kanals 14 Marlas, bearing Khasra No.14/6/2, was in possession of Haria as tenants. Haria in his separate written statement claimed that the whole of the suit land had been in his possession as a tenant before the creation of the mortgage and he continued to be in possession of the whole of it after the creation of mortgage right upto the date of institution of the suit.

5. Trial Court framed various issues based on the pleadings of the parties and concluded that Haria was in occupation of both the Khasra numbers, i.e. the entire suit land, as a tenant even before the creation of the mortgage and continued to be so even thereafter. Consequently, the suit was dismissed.

6. Two appeals were filed against the decree of dismissal of the suit, one by the plaintiffs and the other by Tulsa Singh, defendant No.2. Plaintiffs' grievance was that they were themselves in possession of the entire suit land before the creation of the mortgage and that both the tenants had been inducted by the mortgagee and on redemption of mortgage they were entitled to take back the possession from the tenants. Tulsa Singh claimed that 2 Kanals 12 Marlas area, bearing Khasra No.14/7/1, had been in his possession as tenant even before the creation of the mortgage. Therefore, both the plaintiffs and defendant No.2 Tulsa Singh filed separate appeals seeking reversal of the decree of the trial Court, so far as it affected their claimed rights.

7. The learned District Judge has dismissed both the appeals. Now, one appeal has been filed by the plaintiffs, which is registered as RSA No.120 of 1995. It was admitted on the following substantial questions of law:

1. Whether the tenancy created by the mortgagee is legally binding on the mortgagor or not?

2. Whether lower appellate Court mis-understood and mis-interpreted the documentary as well as oral evidence on the record.
3. Whether the revenue entries as incorporated in the jamabandi for the year 1968-69 could be changed without the knowledge of predecessor-in-interest of the appellants/plaintiffs, if so, its effects?

4. Whether propritory rights can be given qua the land which is self cultivation possession of the land owner and that too in the absence of land-lord.

Other appeal, being RSA No.56 of 1995, has been filed by Tulsa Singh, which was admitted on the following substantial questions of law:

1. Whether the impugned judgments and decrees are legally sustainable so far as it relate to the declaration given interse the defendants?

2. Whether the mutation sanctioned under Section 104 of the H.P. Tenancy and Land Reforms Act without being challenged in a proper proceeding can be held to be baseless by the learned Civil Court?

3. Whether in the facts and circumstances of the case and mutation in favour of the appellant under Section 104 of the H.P. Tenancy and Land Reforms Act becoming final, the civil Court has the jurisdiction to entertain the suit?

4. Whether in the instant case the law laid down by this Hon'ble Court reported in case titled as Chuhniya Vs. Jindu 1991(1) S.L.C. 228 is fully applicable and the impugned judgments are without jurisdiction?

5. Whether the impugned judgments and decrees are the result of mis-appreciation and mis-interpretation of law?

8. During the course of the hearing, the learned counsel for appellant Tulsa Singh has not made any submissions with regard to question No.4. On the contrary, he states that jurisdiction of the Court has been challenged on the ground that once the mortgagee had admitted him to be a tenant in occupation of a part of the suit land, at the time of the creation of the mortgage under the mortgagor, the Civil Court did not have the jurisdiction. He has not explained how the jurisdiction of the Court will be barred if the

mortgagee accepts a person to be a tenant in respect of the mortgage at the time of the creation of the mortgage.

9. Learned counsel for Tulsa Singh appellant has further contended that without challenging the order conferring the proprietary rights upon the appellant, the suit could not have been filed. The argument is without merit. Mutation was not attested in the presence of the plaintiffs or for that matter Haria, who claims that he was in exclusive possession of the entire suit land, including 2 Kanals 12 Marlas area of which Tulsa claims to be a tenant, and, therefore, there was no need for the plaintiffs or defendant Haria to have challenged the order of mutation to succeed in their respective pleas.

10. As regards the merits of the case, the entries in the revenue papers and the oral evidence, which has been discussed threadbare by the two Courts below, show that Haria was already in possession of the suit land as a tenant under all the owners, including Ram Asra, when the mortgage was created. *Misl Hakiat* for the year 1967-68, Ex. DW-3/1, records Santa Singh, the father of respondent-defendant Haria, in possession of the entire suit land as tenant under the owners. This *Misl Hakiat* was prepared on completion of the consolidation process in the village. In the next *Jamabandi*, which was prepared by the revenue staff in the year 1968-69, no doubt Santa Singh, the father of defendant Haria, is shown to be in possession of only 5 Kanals 4 Marlas area out of the total suit land measuring 7 Kanals 6 Marlas, but there is no supporting entry in *Rojnamcha* or *Khasra Girdawari* or any order or decree serving as the basis for the deletion of the name of Santa in

respect of the remaining area measuring 2 Kanals 2 Marlas. Admittedly, the mortgage was created in the year 1971. Name of Tulsa Singh appeared as occupancy tenant in respect of Khasra No.14/7/1 measuring 2 Kanals 12 Marlas, for the first time, in the *Jamabandi*, for the year 1977-78 Ex. P-1. Though there is an entry in the *Rojnamcha* Ex. DW-1/A, dated 29.10.1975, indicating that during the course of the *Girdawari* change was noticed in respect of Khasra No.14/7/1, yet the presence of Haria is not recorded in this *Rojnamcha* entry. That means this entry was made behind the back of Haria, who was being shown in possession of the suit land as a tenant even prior to the creation of the mortgage. It is nobody's case that Haria at any point of time surrendered the possession of 2 Kanals 12 Marlas area, bearing Khasra No.14/7/1, in favour of the owner or the mortgagee or that he was ejected from this number lawfully or even otherwise and therefore, the presumption needs to be drawn that Haria continues to be in possession of the suit land.

11. Learned counsel for Tulsa Singh contended that since the mortgagee herself had supported Tulsa's case that he had been coming in occupation of a portion of the suit land even prior to the creation of mortgage, his plea needs to be accepted. I do not agree with the submission, in view of the above discussed evidence, particularly the fact that Haria is not shown to have surrendered or relinquished the portion over which Tulsa Singh claims to be in possession nor is he shown or even alleged to have been dispossessed from that portion of the suit land.

12. In view of the above stated evidence and the facts and the circumstances, the finding returned by the two Courts below on facts cannot be said to be perverse.

13. As a sequel to the above discussion, all the substantial questions of law on which the appeal of Tulsa Singh, i.e. RSA No.56 of 1995, was admitted, are answered against the appellant. As regards the substantial questions of law formulated in the other appeal, i.e. one filed by plaintiffs RSA No.120 of 1995, Question No.1 does not arise, because the concurrent finding by the two Courts below is that the tenancy had been created by the mortgagor himself and not by the mortgagee. Similarly, Question No.4 also does not arise, in view of the finding that the land was not under self cultivation of the mortgagor when the mortgage was created. Questions No.2 and 3 are answered against the appellants, in view of the above discussed evidence and the conclusion that the findings of the two Courts below on facts call for no interference.

14. It has been pointed out by the learned counsel for Haria that Tulsa has sold a portion of the suit land during the pendency of the appeals in this Court. According to him, the sale had been made by him in favour of one Shiv Kant. Sale or transfer of the subject matter of litigation during the pendency of the litigation is always subject to the decision by the Court with regard to such litigation, in view of the provision of Section 52 of the Transfer of Property Act and, therefore, the sale allegedly made by Tulsa Singh in favour of Shiv Kant in no way affects the rights of the successful party, i.e. respondent-defendant Haria.

15. The net result is that both the appeals have no merit and are, therefore, dismissed.

16. Pending application(s), if any, in both the appeals also stand disposed of.

November 15, 2006(sd) **(Surjit Singh), J.**